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CHARLES ELMORE CR

In the Supreme Court of the United States

OCTOBER TERM, 1934.

No. 32.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA AND ALBERT PHILLIPS,

Petitioners,

vs.

ELLA E. PINKSTON,

Respondent.

PETITION FOR REHEARING.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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Come now the above named Petitioners and respectfully represent to this Honorable Court that on the 5th day of November, 1934, an opinion was rendered and order made affirming the decree of the Court below in favor of the Respondent, (Copy thereof is attached hereto as Appendix); that, subsequent to the filing of the Briefs in this case, other decisions of this Court bearing upon the question involved and at variance with the opinion of the Court rendered in the instant case, were brought to the notice of counsel and do not appear in the Briefs herein; that the opinion of the Court rendered herein suggests a misapprehension of the somewhat complicated facts which were not discussed by the Petitioners as the sole question in issue was one of jurisdictional amount and that it would be inequitable to permit the order to stand as entered as it is in conflict with other decisions of this Court.

QUESTION IN THE CASE.

Although the issue in this case was stated to be:—

> "Where a complainant (widow) 40 years of age, with a life expectancy of 26 years, is the holder of a Pension Certificate providing payment of Thirty Five Dollars ($35.00) per month for life, providing she does not remarry (payment to cease if she remarries), may such future contingent payments be reckoned during life expectancy in order to confer jurisdiction on the federal court."

the real question upon which the answer to the foregoing issue depends is:—

> "IS IT POSSIBLE TO ESTIMATE THE CHANCES OF THE HAPPENING OF AN EVENT WHICH MAY NEVER OCCUR?"

If it is possible to estimate the chances of the happening of an event which may never occur then the value of future payments contingent upon such an event can be calculated but, conversely, if it is not possible to estimate the chances of the happening of an event which may never occur, we respectfully submit it is not possible to calculate the value of future payments contingent upon such an event, for any purpose.

It is well settled by decisions of this Court that jurisdictional amount must clearly appear, that the presumption is against Federal jurisdiction and that, by virtue of Sec. 37 Jud. Code; 28 U. S. C. A. Sec. 80; 36 Stat. 1098, if at any time it shall appear to the trial court the jurisdictional amount is not involved, it is the duty of that court to dismiss the case. If, as a matter of law, it clearly appears from the allegations of the petition that the jurisdictional amount is not involved, it is the duty of the trial court to dismiss the case.

There is no dispute as to the issue in the case at bar. The matter in controversy, upon the value of which Federal jurisdiction depends, is stated by this Court to be "the value of respondent's own interest in the fund." Obviously, Respondent's interest depends upon her certificate. Payments under her certificate terminate if she remarries. This contingency squarely raises the question "To acquire the requisite jurisdictional amount, can the chances of the respondent remarrying be estimated in like manner as the chances of death where payments are fixed for life?"

The problem of arriving at the value of future payments predicated upon similar contingencies for other purposes has been before this Court several times. An identical situation was before this Court in 1903 in the case of *Dunbar v. Dunbar,* 190 U. S. 340.

As we understand the decisions, the primary question of making the calculation is one of mathematics or logic and not a question of law. This would seem to be made quite clear by the comments of this Court in the *Dunbar* case, *supra.* At page 345 this Court said:

> "But how can any calculation be made in regard to the continuance of widowhood when there are *no tables* and *no statistics* by which to calculate such contingency? How can a valuation of a probable continuance of widowhood be made? Who can say what the probability of remarrying is in regard to any particular widow? We know what some of the factors might be in the question: inclination, age, health, property, attractiveness, children. These would, at least, enter into the question as to the probability of continuance of widowhood, *and yet there are no statistics which can be gathered which would tend in the slightest degree to aid in the solving of the question.*" (Italics ours.)

In further discussion this Court said, page 346:

> "Taking the liability as presented by the contract, if the mortality tables were referred to for the

> purpose of ascertaining the value so far as it depended upon life, the answer would be no answer to the other contingency of the continuance of widowhood; and if, having found the value as depending upon the mortality tables, you desire to deduct from that the valuation of the other contingency, *it is pure guesswork to do it.*" (Italics ours.)

We humbly submit that the contingency in the case at bar is identical with the contingency in the *Dunbar* case. In that case this Court practically stated it to be axiomatic that it is impossible to calculate such a contingency for any purpose by stating:

> "There are no statistics which *can* be gathered which would tend in the slightest degree to aid in the solving of the question."

Thompson v. Thompson, 226 U. S. 551, was decided by this Court in 1913, about 10 years after the *Dunbar* case. Although the contingency in the case at bar is identical with the contingency in the *Dunbar* case the Court, in its opinion herein of November 5th, after discussing the *Thompson* case and the case at bar said:—"the situation there and that here fairly cannot be distinguished." Nevertheless, may we humbly point out there was the same distinction between the *Dunbar* case and the *Thompson* case as there is between the *Thompson* case and the case at bar. This Honorable Court recognized the distinction between the *Dunbar* and *Thompson* cases and applied a different rule in the *Thompson* case to what had been applied in the *Dunbar* case after holding as a "*fact*" that the payments were not contingent. Did not that holding of "fact" clearly distinguish the cases?

In the *Thompson* case, as pointed out by this Honorable Court, Mr. Justice Pitney said, page 560:

> "The future payments are *not in any proper sense contingent or speculative,* although they are subject

to be increased, decreased or even cut off, as just indicated." (Italics ours.)

In the *Thompson* case, this Court pointed out and held that the future payments were "fixed" and not contingent or speculative. In the case at bar we humbly submit the future payments are admittedly contingent as they automatically terminate upon remarriage. Does not the holding of "fact" make a clear distinction between the *Thompson* and the instant cases?

In its opinion of November 5th in the case at bar this Court also says:

> "The occurrence of the specified event which would put an end to the obligation is no more uncertain in the one case than in the other."

It must be conceded that the happening or occurrence of the specified event is no more uncertain but we respectfully submit the "effect" of the happening or occurrence of the specified event is entirely different. In the case at bar the mere occurrence of the specified event "automatically" and at once puts an end to future payments. In the *Thompson* case, however, the occurrence or happening of any event would not *ipso facto* affect the future payments in the slightest degree but would only form the basis of an argument why the court having jurisdiction should consider a modification. It might well be that the Court having jurisdiction would not consider any changed circumstances sufficient to justify any modification of the order in which event, the happening of the occurrence would be ineffective.

In the case at bar, the happening of only one event, remarriage, will affect the future payments and that will *ipso facto* terminate them. In the *Thompson* case many changes in the circumstances might justify an application to the court for a modification of the order, though none would *ipso facto* affect the payments in the slightest degree.

We respectfully suggest that even remarriage of a divorced wife is not invariably accepted by the court as a reason for discharging a divorced husband from alimony payments. The acquisition of independent means by a divorced wife is not necessarily sufficient to excuse the divorced husband from payment of alimony. As above suggested, the change in circumstances merely furnishes a "reason" for asking the court to modify the order fixing the payments of alimony. No change in circumstances, in and of itself, affects the order in any manner. Furthermore, no application may ever be made for a change in the order.

In the *Thompson* case, and in cases of similar character, four (4) things must occur before the payments fixed by the Order are disturbed or the status created by the Order interfered with in any way. (1) There must be a change in circumstances, (2) An application must be made to the Court for a modification of the Order, (3) The change must be such as to satisfy the Court a change should be made, and (4) The Court must make the necessary Decree changing the Order. A Court would not move of its own motion and none of the first three items or any combination of them would, of their own force, affect the existing status in the slightest degree. On the contrary, in the case at bar, the single act by the Respondent herself would automatically destroy the existing status and absolutely and finally terminate payments.

During oral argument of this case Mr. Justice Brandeis directed attention to the case of *Humes v. United States*, 276 U. S. 487. This case, involving a similar contingency, deals with succession taxes. We had failed to find the case and consequently it does not appear in our former briefs.

In the *Humes* case, a large sum of money was directed by will to be given to charity in the event of death without issue of a designated female child before age 40. The Executors of the estate contended the chances of the child

dying without issue before age 40 could be estimated and that therefore a certain portion of the estate should be exempt from succession taxes. Obviously, the child might die before age 40 without issue but quite as obviously it is an event which might never occur. In that aspect it is identical with the case at bar where the Respondent may remarry yet it is an event which may never occur. The *Humes* case squarely presented for determination the question:—

> "Is it possible to estimate the chances of the happening of an event which may never occur?"

The case was decided by this Court in 1928. That was 25 years after the decision in the *Dunbar* case and 15 years after the decision in the *Thompson* case. It is interesting to note, however, that the Solicitor General who briefed the case for the government and therefore had the negative of the question as opposing the claimed exemption, did not cite the *Dunbar* case, nor is it referred to by opposing counsel or in the opinion of the Court. To all intents and purposes, therefore, this was again decided as a case of first impression.

We here respectfully point out that, in the trial in the *Humes* case, actuaries testified as to the chances of the happening of the event and also introduced certain prepared tables. Notwithstanding such testimony this Court, by Mr. Justice Brandeis said, page 493:—

> "If all the facts stated had been embodied in findings, no legal basis would be laid for the deduction claimed."

After discussing the narrow basis upon which the actuarial testimony was founded this Court also said, page 494:—

> "Obviously, the calculation that the contingent interest of the charities was equal to 4.0909 per cent of the residue was *mere speculation, bearing the delusive appearance of accuracy.*" (Italics ours.)

In denying exemption from taxation this Court, in the closing paragraph, used the following significant language:—

> "One may guess, or gamble on, or even insure against, any future event. The Solicitor general tells us that Lloyds of London will insure against having twins. But the fundamental question in the case at bar is not whether this contingent interest can be insured against, or its value guessed at, but what construction shall be given to a statute. Did Congress, in providing for the determination of the net estate taxable, intend that a deduction should be made for a contingency *the actual value of which cannot be determined from any known data?* Neither taxpayer, nor revenue officer,—*even if equipped with all the aid which the actuarial art can supply,*—could do more than *guess* at the value of this contingency. It is clear that Congress did not intend that a deduction should be made for a contingent gift of that character." (Italics ours.)

Although neither the *Dunbar* case nor the *Humes* case were before the District Court in the case at bar, that Court, in consideration of the question presented, arrived at the same conclusion as announced by this Honorable Court in those two cases. Even though actuaries testified and introduced tables in the *Humes* case, as in the case at bar, this Court stated it to be axiomatic that:

> "Neither taxpayer, nor revenue officer,—even if equipped with all the aid which the actuarial art can supply,—could do more than guess at the value of this contingency."

Had his language been brought to the notice of the District Court in the case at bar we humbly submit he would have been bound thereby and could have done no other than dismiss the case. Had it been brought to the notice of the Circuit Court of Appeals it is inconceivable that Court would have reversed the District Court. In both the

Dunbar case and in the *Humes* case this Court plainly held that nothing better than a guess can be made at the value of the contingencies.

Following the *Humes* case we find a still later decision by this Honorable Court in which the effect of the removal of the contingency, by positive and uncontradicted evidence, is considered. This case also was not in our prior briefs nor brought to the notice of this Court on oral argument. *United States v. Providence Trust Company,* 291 U. S. 272. This case was decided February 5th, 1934, the opinion of the Court being delivered by Mr. Justice Sutherland.

In that case there was another claim for deduction from succession taxes predicated upon a charitable bequest which was contingent upon the death of a woman without issue. It was the position of the government there is an irrebutable presumption that a woman may always have issue, that the chance of her dying without issue cannot be calculated and that the situation was controlled by the decision of this Court in the *Humes* case.

The facts in the case were that the daughter of the deceased, who was to die without issue before the charitable bequest would become operative, was a woman 50 years of age, she had been in poor health and under a physician's care, that prior to the death of the testator the daughter had undergone an operation for the removal of certain organs which, in the light of present knowledge, rendered her incapable of becoming pregnant or giving birth to a child. This Court held the stated contingency had been absolutely removed and that the bequest would certainly go to charity upon the death of the daughter.

In arriving at its conclusion this Court said, page 286:

> "The sole question to be considered is—What is the value of the interest to be saved from the tax? That is a *practical question,* not concluded by the presumption invoked but to be determined by ascer-

taining in terms of money what the property constituting that interest would bring in the market, subject to such uncertainty as ordinarily attaches to such an inquiry. See *Ithaca Trust Co. v. United States*, 279 U. S. 151, 73 L. ed. 647, 49 S. Ct. 291, *supra*. Thus stated, the birth of a child to the daughter of the deceased after his death was so plainly impossible that, *as a practical matter*, the hazard disappears from the problem. Certainly, in the light of our present accurate knowledge in respect of the subject, if the interest had been offered for sale in the open market during the daughter's lifetime, a suggestion of the possibility of such an event would have been ignored by every intelligent bidder as utterly destitute of reason." (Italics ours.)

This Court therein stated this to be a practical question, (not a question of law) and laid down this test—

> "What is the value of the interest to be saved from the tax?"

The Court then points out that, as a practical matter, the birth of a child had become impossible and that hazard had disappeared from the problem. The Court then says:

> "If the interest had been offered for sale in the open market during the daughter's lifetime, a suggestion of the possibility of such an event would have been ignored by every intelligent bidder as utterly destitute of reason."

May we presume to apply the same test to the interest of the Respondent in the case at bar? If her interest under her certificate, which is defeated upon her remarriage, were offered for sale in the open market, who could be found to make a bid for her interest? Her interest is terminated by remarriage. Even an agreement in writing by her to not remarry, in order to encourage a sale, would not be binding upon her but would be void as against public policy.

In the case last discussed there is a clear and logical holding by this Court that the hazard or contingency had

been removed as a matter of fact and therefore the bequest to the charity was unconditional, to become operative on the death of the daughter. The problem of calculating the chances of the daughter having issue disappeared from the case. May we suggest that a similar situation would arise in the case at bar in the event of a widow becoming incurably insane. Under such circumstances she would be incapable of consummating a contract of marriage. The hazard of remarriage would thereupon disappear from the value of her claim and it would be calculated upon her life expectancy. Only under such circumstances, however, can any actual value be placed on a certificate conditioned as in the case at bar.

In its opinion herein, after expressing the opinion that the value of Respondent's own interest in the fund exceeds the jurisdictional amount this Court says:—

> "This, it will be seen, is not an action at law to recover overdue instalments, but a suit in equity to preserve and protect a right to future participation in the fund. If the value of that right exceeds $3,000, the district court has jurisdiction."

This statement appears to suggest, and it will doubtless be seized upon to support a contention, that there is a difference in the matter of estimating the value of the matter in controversy between a suit in equity and an action at law. No difference is indicated in Sec. 24 of the Judicial Code, 28 U. S. C. A. Sec. 41, nor are we aware of any decision of this or any other court suggesting any such distinction. On the other hand, it has been held that the limitation of the jurisdiction to cases involving $3,000 or more applies to suits in equity as well as to actions at law.

If future contingent payments throughout the life expectancy may be reckoned for the purposes of federal jurisdiction in the case at bar, would it not follow, by the same

reasoning, that federal jurisdiction would be present if the Respondent had elected to bring an action at law. This Court says:

> "Continuance of payments during the life of the Respondent is fixed by contract quite as definitely as continuance of payments for maintenance in the *Thompson* case was fixed by decree, and subject to substantially like conditions subsequent."

This statement would appear to indicate that the Respondent is the holder of a contract and we suggest that, when the things and matters occurred of which she complained she had the right to elect to either bring an action at law on the theory of a breach of her contract or to bring the suit now before the court. The question naturally arises "If respondent had elected to bring an action at law for damages for alleged breach of her contract, would the future payments, conditioned as herein admitted, support federal jurisdiction of such a suit?

This Court held in the *Humes* case that the chances of the happening of a contingency such as is present in the case at bar cannot be estimated even with the aid of all the actuarial art. The *Thompson* case was an exception, where this Court held there was no contingency. We have been unable to find the *Thompson* case has been followed. May we presume to make a brief critical discussion of the decision in the *Thompson* case? Except for the fact this Court held the payments provided by the Court order in that case to be "fixed," could it not well be held that the payments therein were conditional and contingent? It is a theory of the law that all contracts are entered into in contemplation of existing statutes. Such statutes are a part of every contract, by operation of law. Although the Court order granting alimony in the *Thompson* case was unconditional *by its terms*, as a matter of law it was always subject to the reserved power of the court to change the pay-

ments. This power to modify was as much a part of the court order as though written therein in express terms.

While it is true the power to modify existed at all times there is no presumption the court making the order would exercise it at any time. Until the power to modify is invoked as above indicated and exercised, the status created was fixed and continuing. It was undoubtedly for that reason this Court held "the future payments *are not in any proper sense* contingent or speculative." Had the court order contained an express provision "should the plaintiff remarry the court will modify this order and payments shall terminate" it is difficult to conceive this Court would have held the payments were not contingent and speculative.

The doctrine announced and axiom recognized in the cases above discussed, except the *Thompson* case, have frequently been cited and followed by other federal and state courts.

Shanley v. Herold, 141 Fed. 423;
Herold v. Shanley, 146 Fed. 20;
In re Westmoreland, 4 Fed. (2d) 602;
Delaware Trust Company v. Hanley, 53 Fed. (2d) 1042.

In the case last cited a Testator set up five annuities and then gave the sum of $3,000.00 per year to the Vicar of a church, to be in addition to his present salary. This item contained a proviso that "if said salary should be reduced or discontinued after my decease, then payment of this annuity is to be suspended during such period of reduction or discontinuance."

The executor of the Will undertook to capitalize this annuity as a charitable exemption. The Court held the situation to be governed by the reasoning in the *Humes* case and denied the exemption.

On the other hand courts have frequently denied federal jurisdiction where future payments were predicated upon an uncertain and incalculable event, such as recovery from disability.

LaVecchia v. Conn. Mut. Life Ins. Co. of Hartford, Conn., 1 Fed. Supp. 588;

Wyll v. Pacific Mutual Life Ins. Co. of Calif., 3 Fed. Supp. 483;

Kithcart v. Metropolitan Life Ins. Co.: Kevan v. John Hancock Mutual Life Ins. Co., 1 Fed. Supp. 719;

Reliance Life Ins. Co. v. Capital National Bank, 38 Ga. App. Rep. 349; 143 S. E. 924;

Guardian Life Insurance Co. v. Johnson, 186 Ark. 1019; 57 S. W. (2d) 555;

Fields v. Equitable Life Ins. Co., 199 N. Car. 454; 154 S. E. 738.

IF IT BE HELD POSSIBLE TO ESTIMATE THE CHANCES OF THE HAPPENING OF AN EVENT WHICH MAY NEVER OCCUR AN ADDITIONAL PRESUMPTION OR ADDITIONAL ALLEGATIONS ARE NECESSARY TO SHOW JURISDICTIONAL AMOUNT.

Where future payments continue for life, the jurisdictional amount is arbitrarily arrived at by multiplying the payments by the life expectancy and finding the present value of the result. In a given case, even of payments to continue for life, if payments and life expectancy are small, the requisite jurisdictional amount may not appear.

Life expectancy itself is an arbitrary figure, based upon the experience of millions of *normal* lives. Mortality tables are not applicable in every case but only to cases of normally healthy people. The arbitrary average is imposed for practical reasons only and may well fail for any individual life. Experience has demonstrated, however,

that for millions of normal lives, mortality tables provide a practically correct average, though such tables are possible only because the ultimate contingency, death, is inevitable with every individual life. Purely for reasons of expediency, therefore, the figures appearing in recognized life experience tables are arbitrarily imposed.

With a contingency that may never occur, however, as in the case at bar, this Court held in the *Dunbar* case "there are no statistics which *can* be gathered which would tend in the slightest degree to aid in the solving of the problem." In the instant case, to secure the requisite jurisdictional amount, Respondent must establish that she will remain unmarried more than Eight (8) years. The question immediately arises, how that can be done? Surely her mere statement is not sufficient. It cannot be *presumed* that she will remain unmarried throughout her life expectancy nor for any other definite period of years. If, as stated by this Court "there are no tables and no statistics by which to calculate such contingency" and further "there are no statistics which *can* be gathered which would tend in the slightest degree to aid in the solving of the problem" it would almost appear that jurisdiction, as suggested by this Court "depends upon pure guesswork."

While the plaintiff may *allege* that the matter in controversy is of the value of $3,000.00, such allegation is not susceptible of proof under the holdings of this Court that the contingency cannot be valued. By force of the same holdings of this Court the allegation cannot be disproved. In the *Thompson* case this Court held that future payments were "fixed" and "not in any proper sense contingent or speculative" therefore future payments could be reckoned for the life expectancy. The present holding of the Court "that the question of jurisdiction here under consideration is the same in substance as that involved in the *Thompson* case" appears to lead to the inevitable conclusion the

Court holds the future payments herein to be "fixed" and "not in any proper sense contingent or speculative," despite the clear provision that payments terminate if Respondent remarries.

We respectfully submit there was a failure on the part of counsel to make a full presentation, both in briefs and on oral argument, in two aspects. First there was practically no discussion of the facts for the reason that only the legal question of the jurisdictional amount was in issue and second having found a decision of this Court apparently squarely in point, *Dunbar v. Dunbar,* we decided to rely upon authority and refrained from presenting an argument on points which appeared to have been determined and settled. In addition to the foregoing, other decisions were brought to our notice which our best efforts had failed to discover and these decisions were therefore not discussed in our Briefs.

The failure to analyze and discuss the facts in the Briefs may have resulted in a misconception of the actual facts as they appear of record. In its statement of the facts contained in the opinion of the Court it is stated:

> "Widows refusing to settle were to have their names erased from the roll, and be provisionally relegated to another fund. Payment of monthly installments on pensions was discontinued, beginning September 1st, 1931."

If the last statement of fact means that the Respondent and other widows who refused to settle actually had their names erased from the roll and that they have not received any monthly installments or pensions since September 1st, 1931, there is a misapprehension of the facts as they appear in the Record. The record shows (R. 122) the Respondent and the other widows who have refused to settle (a total of 5 widows) had been paid monthly benefits in accordance with the terms of their certificates up to the time of the de-

cision in the Circuit Court of Appeals. There was merely a failure to make the payment falling due on September 1st, 1931 but the payment was subsequently made and accepted by each widow including Respondent.

The fact that this Court has repeatedly recognized, stated and demonstrated the impossibility of calculating the value of a contingency, as in the case at bar, was not adequately presented to the Court. The result is a decision which appears to be at variance with other decisions involving the same problem. Ignoring altogether the interests of the present litigants, we humbly submit to this Court that the entire public has a superior and paramount interest in the logical development of the law and that the greater public interest should not be jeopardized or sacrificed by the ineptitude, incompetence or error of counsel in the presentation of a case.

WHEREFORE, the Petitioners humbly pray that a Rehearing may be granted herein and that the holding and order herein be reviewed and reversed.

THOS. STEVENSON,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I do hereby certify that I prepared and have examined the foregoing Petition for rehearing, that in my opinion such Petition is well founded and should be granted by this Honorable Court and that said Petition is presented in good faith and not for delay.

Dated this 28th day of November, 1934.

THOS. STEVENSON,
Attorney for Petitioners.

APPENDIX.

SUPREME COURT OF THE UNITED STATES.

No. 32.—October Term, 1934.

Brotherhood of Locomotive Firemen and Enginemen, David B. Robertson Timothy Shea, and Albert Phillips, Petitioners, vs. Ella E. Pinkston.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[November 5, 1934.]

Mr. Justice Sutherland delivered the opinion of the Court.

The Brotherhood of Locomotive Firemen and Enginemen is an unincorporated voluntary association with headquarters in Ohio. It has a department known as the Widows' Pension Department, created in order to provide a monthly income for the widows or widowed mothers of deceased members. The widow of a member, upon his death, is to receive a pension of $35 per month during her lifetime. In the event of her remarriage, the pension is to cease. The respondent, widow of a deceased member, became entitled to this pension. Thereafter, the association, following an investigation of the financial condition of the department and upon an actuarial report, determined to abolish the department and distribute the assets after making a lump-sum settlement not to exceed $1500 with each widow then on the pension roll. Widows refusing to settle were to have their names erased from the roll, and be provisionally relegated to another fund. Payment of monthly instalments on pensions was discontinued, beginning September 1st, 1931.

Complainant thereupon brought suit in a federal district court, on behalf of herself and other beneficiaries similarly situated, for an accounting, determination of priorities, and a proper liquidation and administration of the funds of the department. The federal jurisdiction was invoked on the ground of diversity of citizenship. The district court, after a hearing, dismissed the bill on the ground that the requisite amount to confer jurisdiction (over $3,000) was not involved. The court of appeals reversed (69 F. (2d) 600) upon the authority of *Thompson v. Thompson*, 226 U. S. 551. Whether that court rightly held that the jurisdictional amount was involved is the only question for consideration.

The entire fund is nearly $300,000. The bill proceeds on the theory that this constitutes a trust fund, and seeks its administration under judicial orders. Respondent urges that the jurisdiction may well be tested by the value of the whole fund. But we put that question aside, since we are of opinion that the value of respondent's own interest in the fund exceeds the jurisdictional amount.

This, it will be seen, is not an action at law to recover overdue instalments, but a suit in equity to preserve and protect a right to future participation in the fund. If the value of that right exceeds $3,000, the district court has jurisdiction.

In the *Thompson* case, a decree had been entered by the Supreme Court of the District of Columbia in favor of a wife against her husband, for support and maintenance at the rate of $75 a month, together with $500 for counsel fees. The decree was reversed by the Court of Appeals of the District. On an appeal to this court, our jurisdiction was challenged upon the ground that a sum in excess of $5,000 was not involved, as the statute at that time required. While the instalments already accrued amounted to much less than that, it was held that the expectancy of

life of the parties was clearly sufficient to make up the balance, and jurisdiction was upheld. Mr. Justice Pitney, who delivered the opinion, said (p. 560)—"The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased or even cut off, as just indicated."

The situation there and that here fairly cannot be distinguished. The life expectancy of respondent, as shown by the mortality tables, is enough to bring the value of the future pension instalments, as of the date of the suit, to a sum much in excess of $3,000; and as to that no point is made. The jurisdictional defect said to exist is that the payments are to cease in the event of respondent's remarriage; and this condition, petitioners say, makes future payments depend entirely upon the volition of the widow, and whether they may accrue is, therefore, a matter of pure speculation. Indeed, the happening of the event does not depend (if that would matter) upon the widow's volition alone, but equally upon the willingness of another to marry her. Continuance of payments during the life of the respondent is fixed by contract quite as definitely as continuance of payments for maintenance in the *Thompson* case was fixed by decree, and subject to substantially like conditions subsequent. In the *Thompson* case the payments were subject to be cut off entirely, not only by death but, the court said, "in the event of a change in the circumstances of the parties." The same is true here. In no respect are we able to see any difference in principle between the two cases. The occurrence of the specified event which would put an end to the obligation is no more uncertain in the one case than in the other.

Moreover, the evidence discloses that the expectancy of remarriage and its effect upon the value of the pension is capable of actuarial determination. The law of averages applies in respect of that event, as it does in respect of

death and of other events. Mr. Pipe, an actuary called as a witness by petitioners, testified that the value of respondent's right to receive $35 a month so long as she remained unmarried was, in round figures, $6,000 as of August 1, 1931. A report made to the Brotherhood, filed June 2, 1932, by its Committee on Constitution, which seems to have been made after careful study, contains the statement:

> "The 'present value' can be determined if we know the average ages of widows corresponding to the ages at the death of members, and we know the proportion of widows who remarry. This information is available from the records of Pension Funds. For example, if we know that the average age of the widows of members who die at age 40, is 36, then the value of the benefit in event of death at 40, is the present value of a pension of $420 per annum on the life of a woman aged 36, taking into account the chances of remarriage. The benefit has a definite 'lump sum' value on the death of the member, * * *"

Counsel upon both sides have cited and discussed decisions of this and other courts bearing upon the general subject. We have examined these decisions, but find it unnecessary to review or distinguish them. We agree with the court below that the question of jurisdiction here under consideration is the same in substance as that involved in the *Thompson* case; and, that being so, the decree of the court below must be affirmed.

So ordered.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 32.—October Term, 1934.

Brotherhood of Locomotive Firemen and Enginemen, David B. Robertson Timothy Shea, and Albert Phillips, Petitioners,
vs.
Ella E. Pinkston.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[November 5, 1934.]

Mr. Justice Sutherland delivered the opinion of the Court.

The Brotherhood of Locomotive Firemen and Enginemen is an unincorporated voluntary association with headquarters in Ohio. It has a department known as the Widows' Pension Department, created in order to provide a monthly income for the widows or widowed mothers of deceased members. The widow of a member, upon his death, is to receive a pension of $35 per month during her lifetime. In the event of her remarriage, the pension is to cease. The respondent, widow of a deceased member, became entitled to this pension. Thereafter, the association, following an investigation of the financial condition of the department and upon an actuarial report, determined to abolish the department and distribute the assets after making a lump-sum settlement not to exceed $1500 with each widow then on the pension roll. Widows refusing to settle were to have their names erased from the roll, and be provisionally relegated to another fund. Payment of monthly instalments on pensions was discontinued, beginning September 1st, 1931.

Complainant thereupon brought suit in a federal district court, on behalf of herself and other beneficiaries similarly situated, for an accounting, determination of priorities, and a proper liquidation and administration of the funds of the department. The federal jurisdiction was invoked on the ground of diversity of citizenship. The district court, after a hearing, dismissed the bill on the ground that the requisite amount to confer jurisdiction (over

$3,000) was not involved. The court of appeals reversed (69 F. (2d) 600) upon the authority of *Thompson* v. *Thompson,* 226 U. S. 551. Whether that court rightly held that the jurisdictional amount was involved is the only question for consideration.

The entire fund is nearly $300,000. The bill proceeds on the theory that this constitutes a trust fund, and seeks its administration under judicial orders. Respondent urges that the jurisdiction may well be tested by the value of the whole fund. But we put that question aside, since we are of opinion that the value of respondent's own interest in the fund exceeds the jurisdictional amount.

This, it will be seen, is not an action at law to recover overdue instalments, but a suit in equity to preserve and protect a right to future participation in the fund. If the value of that right exceeds $3,000, the district court has jurisdiction.

In the *Thompson* case, a decree had been entered by the Supreme Court of the District of Columbia in favor of a wife against her husband, for support and maintenance at the rate of $75 a month, together with $500 for counsel fees. The decree was reversed by the Court of Appeals of the District. On an appeal to this court, our jurisdiction was challenged upon the ground that a sum in excess of $5,000 was not involved, as the statute at that time required. While the instalments already accrued amounted to much less than that, it was held that the expectancy of life of the parties was clearly sufficient to make up the balance, and jurisdiction was upheld. Mr. Justice Pitney, who delivered the opinion, said (p. 560)—"The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased or even cut off, as just indicated."

The situation there and that here fairly cannot be distinguished. The life expectancy of respondent, as shown by the mortality tables, is enough to bring the value of the future pension instalments, as of the date of the suit, to a sum much in excess of $3,000; and as to that no point is made. The jurisdictional defect said to exist is that the payments are to cease in the event of respondent's remarriage; and this condition, petitioners say, makes future payments depend entirely upon the volition of the widow, and whether they may accrue is, therefore, a matter of pure speculation. Indeed, the happening of the event does not depend (if that would matter)

upon the widow's volition alone, but equally upon the willingness of another to marry her. Continuance of payments during the life of the respondent is fixed by contract quite as definitely as continuance of payments for maintenance in the *Thompson* case was fixed by decree, and subject to substantially like conditions subsequent. In the *Thompson* case the payments were subject to be cut off entirely, not only by death but, the court said, "in the event of a change in the circumstances of the parties." The same is true here. In no respect are we able to see any difference in principle between the two cases. The occurrence of the specified event which would put an end to the obligation is no more uncertain in the one case than in the other.

Moreover, the evidence discloses that the expectancy of remarriage and its effect upon the value of the pension is capable of actuarial determination. The law of averages applies in respect of that event, as it does in respect of death and of other events. Mr. Pipe, an actuary called as a witness by petitioners, testified that the value of respondent's right to receive $35 a month so long as she remained unmarried was, in round figures, $6,000 as of August 1, 1931. A report made to the Brotherhood, filed June 2, 1932, by its Committee on Constitution, which seems to have been made after careful study, contains the statement:

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Counsel upon both sides have cited and discussed decisions of this and other courts bearing upon the general subject. We have examined these decisions, but find it unnecessary to review or distinguish them. We agree with the court below that the question of jurisdiction here under consideration is the same in substance as that involved in the *Thompson* case; and, that being so, the decree of the court below must be affirmed.

So ordered.